LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 29 1958
JOHN T. FEY, Clerk

No. 685

In the Supreme Court of the United States

OCTOBER TERM, 1957

ALTHEA G. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

MORTON HOLLANDER,
Attorney,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Argument	9
Conclusion	13
Appendix	14

CITATIONS

Cases:

Estate of Spiegel v. *Commissioner*, 335 U.S. 701	12
Murphey v. *United States*, 179 F. 2d 743	12
Propper v. *Clark*, 337 U.S. 472	12
United States v. *Campbell*, 172 F. 2d 500, certiorari denied, 337 U.S. 957	7
United States v. *Eleazer*, 177 F. 2d 914, certiorari denied, 339 U.S. 903	7
United States v. *Johnson*, 181 F. 2d 577	8
United States v. *Sharpe*, 189 F. 2d 239	7
United States v. *Taylor*, 236 F. 2d 649, 352 U.S. 963, 353 U.S. 956, 355 U.S. 801	12

Statute:

Federal Tort Claims Act:	
28 U.S.C. 1346(b)	14
28 U.S.C. 2671	14
28 U.S.C. 2674	14

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 685

ALTHEA G. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California (2 R.[1] 3) is reported at 141 F. Supp. 851. The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. A) is reported at 248 F. 2d 492. Earlier opinions in this case are reported at 105 F. Supp. 208, 215 F. 2d 800, and 350 U.S. 857.

---

[1] The record filed by petitioner is in three volumes. Thus, "2 R." refers to volume 2 of the record.

JURISDICTION

Judgment of the court of appeals was entered on September 26, 1957 (3 R. 27). The petition for a writ of certiorari was filed on December 23, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below properly interpreted the California law of *respondeat superior* in refusing to hold the United States liable for injuries caused by a serviceman who, while off duty and on pass, obtained unauthorized possession of a military vehicle and went joy riding in it.

STATUTE INVOLVED

The relevant provisions of the Federal Tort Claims Act are set forth in the Appendix, *infra*, pp. 14-15.

STATEMENT

The "Basic Facts" are summarized in the opinion of the court below as follows (Pet. App. A 1-3):

> From the record certain facts appear to be clearly established. Appellant, an employee of a private construction firm on the Island of Guam, sustained personal injuries when a parked car in which she was sitting was struck by a military vehicle driven by Corporal Seabourn. The accident occurred near a "breakwater" parking spot in Agana, Guam at or about 10:30 p.m. on March 3, 1949. Seabourn had obtained an official pass to leave the Guam army base

where he was stationed, this pass covering (so far as all of the evidence reveals) the entire day and night of March 3, 1949. During the afternoon of that day and while authorized to be away from his army post, Seabourn in the company of two other soldiers (Schmidt and Vincent) engaged in drinking intoxicating beverages.

The three men returned to their army base "unit" about 7 p.m. on that day and while there, Sergeant Stiles, a member of Seabourn's company, handed Seabourn a so-called "trip ticket" for a ¾ ton vehicle known as a "weapons carrier." This ticket had been made out about 8 a.m. of that morning to a driver named Cabera, a soldier who also worked with Seabourn. The "ticket" indicates that on the day in question the vehicle had been requested by a Lt. W. R. Werb, and the *use* of the vehicle was therein authorized for "Official Business." Listed on the ticket are the various points to which the weapons carrier was driven that day. Neither Seabourn's nor Stiles' names appears on the ticket, nor was Seabourn's *use* of the vehicle in any way indicated thereon.

In the army company "unit" or "section" in which Seabourn was serving, a loose practice had prevailed for several months under which servicemen in this unit were able to secure possession of army vehicles to drive for their own pleasure. this being accomplished by these men by informally "passing around" among themselves "trip tickets" which might have been issued to another driver for official army use, in this case the vehicle involved having been assigned to a man named Cabera for the use of Lieutenant Werb on the day of the accident.

Having secured the vehicle that evening by such informal means, Seabourn (in company with Schmidt and Vincent) drove the army vehicle to the Enlisted Men's Club on the Island where they drank beer and champagne after which they decided to "go for a ride." Thereafter, and prior to the accident here involved, and at a rather late hour, Seabourn let his companions out of the army vehicle and "took off" alone. It was during this night drive that the accident occurred at a time when, according to Seabourn's sworn statement, he was driving the vehicle "only for recreation." His two companions made official statements under oath for official army records, these statements setting forth many of the above mentioned facts. In the course of this litigation, the recitals in these records, and their later depositions, contained the averment that at the time Seabourn left them to make his night drive he was "definitely drunk" and "very drunk." Seabourn swore that he remembered nothing that occurred after he left Schmidt and Vincent except that the next morning he awoke alongside the road when the sun was shining.

None of these three men claimed that they were required to execute military orders of any kind, or to perform military duties of any kind while away from their post on March 3, 1949, nor do they attempt to claim that army regulations then in force sanctioned the informal use of army vehicles for the purpose, and under the conditions of use shown by Seabourn's activities on that day and night.

Furthermore, there is absolutely nothing in the record to show that Seabourn's superior military officers had personal knowledge of, or

> control or supervision over, the use of the vehicle while it was in Seabourn's possession on all of the day and night of March 3, 1949, nor any control over Seabourn's activities after he got the trip ticket from Stiles on that evening and thus used the Cabera ticket which had been issued that morning for the use of Lt. Werb. Nor had any military order been issued by a superior officer directing, authorizing or permitting Seabourn to drive or use the vehicle during that day or night *for any purpose*, military or otherwise (including "recreation"), or for the discharge of any kind of a military order or duty.

Notwithstanding the foregoing facts, petitioner's complaint against the United States under the Tort Claims Act asserted that Seabourn's negligent operation of the vehicle was in the line of his duty for the Government (1 R. 1). These allegations were denied in the Government's answer (1 R. 6). Upon trial of the case, the District Court for the Northern District of California found that the accident was caused by Seabourn's negligence (1 R. 51). It further found, however, that Seabourn was off duty and away from his base on a pass when the accident happened; that he had obtained unauthorized possession of the military vehicle; that he was not using it for any purpose authorized by Army regulations, by his superior officers, or by the trip ticket; that, instead, he was on a frolic of his own, and not acting within the scope of his employment (1 R. 47, 51-52). Judgment was therefore entered in favor of the Government (1 R. 52-53).

On appeal, the court of appeals approved the district court's findings. 215 F. 2d 800. In addition, the court of appeals reviewed the facts independently and found that "Seabourn's use of the vehicle while * * * 'off duty' and in quest of entertainment, was not a use in furtherance of any prescribed or indicated military duty"; that Seabourn did not use the vehicle to "serve any prescribed or noted military purpose or interest of the government"; that his use of the vehicle was not "motivated by such a purpose"; that his superior officers "had no knowledge of, or supervision over, the use of the vehicle while it was in Seabourn's possession, nor any control over Seabourn after he had secured it from Stiles"; and that no order had been issued by any superior officer "directing or authorizing Seabourn to use the vehicle for *any purpose*, military or otherwise (including 'recreation')" (1 R. 172).

The opinion of the court of appeals further pointed out (215 F. 2d 800, 808-809; 1 R. 180):

> Reduced to their simplest terms, the facts of this case show beyond any doubt that Seabourn was out on a wild frolic when he injured appellant; that he was then drunk and in an irresponsible mood; that he was not then executing any military order or on military business of any kind. And if resort be had to the California cases cited in our Murphey opinion which deal with liability of a private employer (under the respondeat superior doctrine), we suggest that it would bankrupt the most exuberant imaginative powers to envision Seabourn's criminal conduct as an activity which a private employer

> "should reasonably have expected would be done," or that such conduct was "serving his master."

Noting that a private employer would not "be held liable in damages for the tortious act of an employee occurring on an allowed 'day off' while he is out driving on a joy ride while drunk," the court of appeals affirmed the district court judgment, which had exonerated the Government from liability for Seabourn's negligence while "out on a wild frolic" (1 R. 179, 180, 183).

Petitioner thereupon filed a petition for a writ of certiorari in this Court, stressing the conflict in decisions between the circuits as to whether the "scope of employment" or "*respondeat superior*" question in Federal Tort Claims Act suits was to be decided by reference to Federal law or to the law of the State where the negligent act or omission occurred (Pet. No. 470, Oct. Term, 1954, pp. 7-14).[2] This Court granted the petition and resolved the conflict by holding that local law controlled. In its *per curiam* decision the Court declared (350 U.S. 857):

---

[2] The Fifth Circuit, in *United States* v. *Campbell*, 172 F. 2d 500, 503 (C.A. 5), certiorari denied, 337 U.S. 957, had earlier viewed State law as controlling. See also *United States* v. *Eleazer*, 177 F. 2d 914 (C.A. 4), certiorari denied, 339 U.S. 903. The Court of Appeals for the Ninth Circuit, on the other hand, had held in its first opinion in this *Williams* case that Federal law was determinative, at least where the plaintiff had been injured by a Federal military employee, rather than by a civilian. 215 F. 2d 800, 807; 1 R. 178-179. This accorded with the Fourth Circuit's view at that time. *United States* v. *Sharpe*, 189 F. 2d 239, 241.

> This case is controlled by the California doctrine of *respondeat superior*. The judgment [of the court of appeals] is vacated and the case is remanded [to the district court] for consideration in the light of that governing principle.

On remand, the district court recognized that "the only question now before the court is whether the facts of this case, when considered under applicable California law,[3] will support plaintiff's contention that Seabourn was acting within the scope of his employment at the time of the collision" (2 R. 5). After a careful and detailed review of the California cases (2 R. 6-13), the district court ruled that (2 R. 13):

> * * * Seabourn's conduct on the entire day of the collision cannot be construed under California law to have been within the scope of his employment. At the time of the accident he was on his day off—subject to his own whims, desires and devices. The evidence is devoid of any showing that Seabourn, at any time during the course of his day off interspersed his employer's work with his own personal and unrelated activities. In the absence of these factors the court finds that the facts in this case do not meet the test of the respondeat superior doctrine as enunciated by the California cases so as to impose financial responsibility on the United States.

---

[3] Guam has adopted, as the court below has observed in this case, "the rule of respondeat superior in force in California. It is thus 'the law of the place,' i.e., Guam." 215 F. 2d 800, 802; 1 R. 170. See also *United States* v. *Johnson*, 181 F. 2d 577, 580-581 (C.A. 9).

In view of this ruling and on the basis of the earlier findings of fact entered by the district court at the time of its first judgment in the case—all of which findings were expressly "remade and reinstated"—the trial court again directed the dismissal of the complaint and the entry of judgment in favor of the United States (2 R. 16, 17).

On appeal, the court below, also recognizing that "the problem to be resolved is the application of the California doctrine of respondeat superior so far as several pertinent decisions reveal it," fully analyzed all the California decisions in point (Pet. App. A 12-22). Based on this analysis, the court stated its "full agreement with the [trial] court's disposition of the issues in this case" and accordingly affirmed the trial court's judgment (Pet. App. A 23).

ARGUMENT

Petitioner, in seeking review of the affirmance by the court below of the trial court's holding that "the facts in this case do not meet the test of the respondeat superior doctrine as enunciated by the California cases" (2 R. 13, 16), necessarily relies on the contention that the decisions below misapply and misinterpret the law of California (Pet. 8-16).

There is, of course, no doubt in this case that the law of California furnishes the rule as to whether there is any *respondeat superior* liability on the part of the United States for Seabourn's negligent conduct on his "day off" while driving on a wild frolic and joy ride (1 R. 179, 180, 183). It is equally clear, notwithstanding petitioner's assertions to the con-

trary, that both courts below not only fully recognized the need for invoking local California law but also based their decisions exclusively on that law.

Thus, the trial court on remand, in full conformity with this Court's direction that "[t]his case is controlled by the California doctrine of *respondeat superior*" (350 U.S. 857), noted that "the only question now before the court is whether the facts of this case, when considered under applicable California law, will support [petitioner's] contention that Seabourn was acting within the scope of his employment at the time of the collision" (2 R. 5). The trial court then proceeded to consider, analyze, discuss, and cite over twenty California "scope of employment" cases relied on by both petitioner and respondent (2 R. 4-14). After this careful and exhaustive analysis, the trial judge—who, as a state and federal judge in California for over 45 years, has been constantly dealing with issues of California law—concluded that "Seabourn's conduct on the entire day of the collision cannot be construed under California law to have been within the scope of his employment" (2 R. 13).

In affirming, the court of appeals reiterated that the "problem to be resolved is the application of the California doctrine of respondeat superior" (Pet. App. A 12). The opinion of the court of appeals, like that of the trial judge, then carefully discusses and analyzes all the pertinent California decisions (Pet. App. A 12-21). The court of appeals' opinion, after this analysis of California law and after weighing all of the factors which must be considered in "appraising 'scope of employment' cases in California,"

stated its "full agreement" with "the able and experienced trial judge in the instant case" (Pet. App. A 16, 22, 23).

It is obvious, therefore, that both courts below, as required by this Court's decision in this case, properly looked to California law in exonerating the Government from liability. Petitioner contends in effect that the reference by the courts below to certain Army regulations covering use of Army vehicles necessarily meant that the courts had "abandoned any reference to California law" (Pet. 9). But the opinions below make it perfectly clear that the Army regulations, while taken into consideration, were in no way determinative on the issue of *respondeat superior* liability. On that issue, California law was accepted by both courts below as fully controlling. The Army regulations, as the trial judge expressly noted, were "not binding on the question of liability herein" (2 R. 11). And it is appropriate to note here that we have never contended that a serviceman whose activity is in violation of an Army regulation is necessarily outside the scope of his employment. We fully concede that, if the whole action is plainly for the benefit of the service and furthers governmental interests or business, the serviceman may still be acting within the scope of his employment under the local law applicable under the Tort Claims Act even though his conduct involves a violation of an Army regulation.[1] But it does not follow, as peti-

[1] Thus, a soldier ordered to deliver Army supplies to another installation by Army truck is acting within the scope

tioner seems to contend, that any time an Army regulation is violated the violator must be deemed to be acting within the scope of his employment. Certainly, no California case—or any other authority—has been or can be cited by petitioner in support of that contention.

It cannot therefore be questioned that both courts below accepted and fully applied California law. And their decisions neither conflict [5] with, nor misinterpret the applicable California law. To the contrary, the fact that the court below, like the trial judge, is constantly dealing with issues of California law, makes it even more probable that California law was correctly interpreted and applied to the facts of this case. See *Propper* v. *Clark*, 337 U.S. 472, 486-487; *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-708. Any further review by this Court is, we submit, not warranted.[6]

---

of his employment while operating the truck on that mission even though he operates it recklessly and while drunk, in violation of the pertinent Army regulations.

[5] *Murphey* v. *United States*, 179 F. 2d 743 (C.A. 9), which is so heavily relied upon by petitioner, holds nothing more than that the driver of an Army truck, acting pursuant to orders in carrying an organized group of soldiers into town for a specified recreational activity, is within the scope of his employment even though the accident happened about two or three blocks off his prescribed route. In the present case, it is plain that Seabourn was not using the vehicle to transport military personnel in connection with an organized and authorized activity.

[6] Petitioner also suggests that certiorari should be granted here so that the present case may be considered along with *United States* v. *Taylor*, 236 F. 2d 649 (C.A. 6), certiorari

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

MORTON HOLLANDER,
Attorney.

JANUARY 1958.

---

granted, 352 U.S. 963 (No. 49, this Term). But the *Taylor* case was settled with the approval of the trial court (see 353 U.S. 956), and the writ of certiorari in that case was dismissed in accordance with Rule 60 of this Court. 355 U.S. 801. The *Talyor* case, it should also be noted, arose out of an airplane crash in Tennessee and a factual background wholly different from that here involved. It is significant that, unlike the present case, the trial judge for the United States District Court of Tennessee found in *Taylor* that the Air Force pilot and crew were acting within the scope of th ir employment and for that reason awarded judgment to the plaintiffs. On appeal, two judges of the Court of Appeals for the Sixth Circuit, disagreeing with the trier of facts, reversed his judgment. 236 F. 2d 649. Judge Martin, an experienced practicing lawyer and judge in Tennessee for many years, dissented.

APPENDIX

Sections 1346(b), 2674, and 2671 of Title 28 U.S.C. (the reenactment of the Federal Tort Claims Act, 62 Stat. 933, 983, 982), provide in pertinent part:

Section 1346. *United States as defendant.*

* * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * *

Section 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * *

Section 2671. *Definitions.*

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

* * * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or per-

manently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

453496 962